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IN THE

Supreme Court of the United States

No. A-417

ROBERT JOHNSON,

Petitioner,

vs.

EMMETT J. DENNIS, JR., ETC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Robert Johnson, a citizen of the State of Nebraska, respectfully prays to this Honorable Court that a writ of certiorari be issued to the Supreme Court of Nebraska, to review a judgment of that Court entered on June 4, 1971, wherein said Court upheld the revocation of the driver's license of the petitioner; and an order of that Court entered on July 20, 1971 denying petitioner's motion for a rehearing.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported in *Johnson v. Dennis,* 187 Neb. 95, a copy of said opinion is attached to this petition and may be found in Appendix A, and in the certified copy of the record beginning at Page 140.

There is no opinion of the Supreme Court of Nebraska regarding the denial of petitioner's motion for rehearing; there is only the order of said Court denying said rehearing, a copy of which is attached to this petition and may be found in Appendix B, and in the certified copy of the record at Page 148.

JURISDICTION

The opinion of the Nebraska Supreme Court upholding the revocation of petitioner's driver's license was entered on June 4, 1971.

The order of the Nebraska Supreme Court denying petitioner a rehearing was entered on July 20, 1971.

On October 21, 1971 The Honorable Harry A. Blackmun entered an order extending the time within which petitioner could petition for certiorari to December 17, 1971.

The jurisdiction of the Supreme Court of the United States is invoked under 62 Stat. 929; 28 U. S. C. A. § 1257.

QUESTION PRESENTED FOR REVIEW

When a motorist is told by the police officer that he has a right to remain silent before the officer asks for a chemical test from the motorist, is it then consistent with due process of law for the State to revoke the driver's license

of the motorist on the basis that the silence of the motorist constituted a refusal to take the test?

STATUTORY PROVISIONS INVOLVED

SECTION 39-727.03 DRUNKEN DRIVING; IMPLIED CONSENT OF OPERATOR OF MOTOR VEHICLE TO SUBMIT TO CHEMICAL TEST TO DETERMINE ALCOHOLIC CONTENT OF BLOOD, URINE, OR BREATH; WHEN TEST ADMINISTERED.

Any person who operates or has in his actual physical control a motor vehicle upon a public highway in this State shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his body fluid.

The test shall be administered at the direction of a law enforcement officer whenever the person has been arrested for any offense (1) involving operating a motor vehicle under the influence of alcoholic liquor in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under the influence of alcoholic liquor, or (2) involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that before his arrest the person was driving or in actual physical control of a motor vehicle with an amount of alcohol in his or her blood in violation of a statute or a city or village ordinance.

SECTION 39-727.04 DRUNKEN DRIVING; CHOICE OF TEST; PERSONS QUALIFIED TO ADMINISTER

TESTS; PRIVILEGES OF PERSON TESTED; RESULTS OF TEST; AVAILABLE UPON REQUEST.

The person so arrested or taken into custody may choose whether the test so required shall be a chemical test of his blood or urine, or of his breath if equipment for testing breath is then and there available. Only a physician, registered nurse, or registered laboratory technologist, acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein; *Provided,* this limitation shall not apply to the taking of a urine or a breath specimen. The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence. Upon the request of the person tested, the results of the test taken at the direction of the law enforcement officer shall be made available to him.

SECTION 39-727.05 DRUNKEN DRIVING; CHEMICAL TESTS; CONSENT OF PERSON INCAPABLE OF REFUSAL NOT WITHDRAWN.

Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by Section 39-727.03 and the test may be given.

SECTION 39-727.06. DRUNKEN DRIVING; CHEMICAL TEST; VIOLATION OF STATUTE OR ORDINANCE; RESULTS; COMPETENT EVIDENCE.

Any test made under the provisions of Sections 39-727.03 to 39-727.12, if made in conformity with the requirements of Section 39-727.02, shall be valid for the purposes of Section 39-727.01, and shall be competent evidence in any prosecution under a State statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute or city or village ordinance.

SECTION 39-727.08 DRUNKEN DRIVING; REFUSAL TO SUBMIT TO A CHEMICAL TEST; SWORN REPORT OF ARRESTING OFFICER; CONTENTS.

If a person so arrested shall refuse to submit to the test provided for in Section 39-727.03, it shall not be given, and the arresting officer shall make a sworn report to the Director of Motor Vehicles stating that he had reasonable grounds to believe that the person was operating or in actual physical control of a motor vehicle upon a public highway while he was under the influence of alcoholic liquor or while he has an amount of alcohol in his blood in violation of a statute or a city or village ordinance, and the facts upon which such belief was based, that such person was placed under arrest, and that he refused to submit to the test.

SECTION 39-727.09 DRUNKEN DRIVING; REFUSAL TO SUBMIT TO CHEMICAL TEST; REPORT OF ARRESTING OFFICER; DIRECTOR OF MOTOR VEHICLES; HEARING; NOTICE; REVOCATION OF OPERATOR'S LICENSE; HEARING EXAMINERS.

Upon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a

date for hearing before him as to the reasonableness of the refusal to submit to the test. The notice of hearing shall be served by the Director by mailing it to such person by certified or registered mail to the last known residence address of such person, or, if such address is unknown, to the last known business address of such person at least ten days before the hearing. After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license or nonresident operating privilege of such person, for a period of one year from the date of such order. For the purpose of such hearing, the director may appoint an examiner who shall have the power to preside at such hearing, to administer oaths, examine witnesses and take testimony, and thereafter report the same to the director.

ARTICLE XIV, Section 1, of the CONSTITUTION OF THE UNITED STATES OF AMERICA.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the revocation of petitioner's driver's license by the Director of the Department of Motor Vehicles of the State of Nebraska under the Nebraska Implied Consent Law.

On December 14, 1968 petitioner was arrested for driving under the influence of alcohol by trooper Darrell Feeney of the Nebraska Highway Patrol. He was taken to the county jail, in Geneva, Nebraska. There Trooper Feeney read to petitioner a statement about the Nebraska Implied Consent Law. This statement is Exhibit 1 (T130). It provides in part as follows:

TO THE DEFENDANT

"You are hereby advised again, that you are under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcohol. You are advised of the following:

1. You are hereby advised that you have the right to an attorney and if you so desire you may call one now. You also have the right to remain silent.

2. The law of the State of Nebraska provides that body fluid specimens, either urine, blood, or breath, may be used as evidence to determine alcoholic content in your body at the time the specimen is taken.

3. You are advised that any person who operates or has in his actual physical control a motor vehicle upon a public highway in the State of Nebraska shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his body fluid.

4. You are advised that you have the right to refuse to submit to such a body specimen test; However, if you do refuse, I, the arresting officer, will make a sworn report to the Director of Motor Vehicles stating, that I had reasonable grounds to believe that you were operating or in actual physical control of a motor vehicle upon a public highway under the influence of alcoholic liquor or with an amount of alcohol in your blood in violation of the State Statutes, and the facts upon which such belief is based, and

that you refused to submit to a test. Upon receipt of my sworn statement the Motor Vehicles Director will conduct a hearing as to your reasonableness in refusing to submit to a test. If you do not show to the Director that your refusal was reasonable, the Director shall revoke your operator's license for one year.

5. You may choose whether the test so required shall be a chemical test of your blood, urine; or of your breath, if equipment for testing breath is available. However, breath equipment is not available, so your choice at this time is a blood or urine test.

6. If you shall desire, in addition to the specimen given to me, you may have a physician of your choice evaluate your condition and perform or have performed whatever laboratory tests your physician deems appropriate in addition to and following the test administered at my direction."

Trooper Feeney then asked petitioner for a test. Petitioner consented to give a urine test but said he wanted to talk to his lawyer first. Petitioner's attorney arrived and again petitioner was asked by Trooper Feeney for a test. Petitioner remained silent.

Proceedings were instituted by the State of Nebraska to revoke petitioner's license under the Implied Consent Law. A hearing was held before the examiner for the respondent, and on February 24, 1969 respondent entered an order revoking petitioner's driver's license (T27).

Petitioner then appealed to the District Court of Fillmore County, Nebraska praying that the order of the respondent be vacated and set aside and for an injunction. In his petition, petitioner alleged that he had been denied due process of law (T13) in subparagraph 7f thereof.

The District Court held against the petitioner and an

appeal was taken to the Supreme Court of Nebraska. The Supreme Court of Nebraska held that silence in the face of a direct inquiry was a refusal. (See Appendix A)

Petitioner filed a motion for rehearing (T147) in which he alleged that a person is deprived of his liberty without due process of law when his driver's license is taken away from him on the basis that his silence constituted a refusal to submit to a chemical test under the State's Implied Consent Law when he was told by the police officer in advance that he had a right to remain silent (See Page 7 of Petitioner's Motion for Rehearing). This was the first time petitioner expressly made this argument although this argument is fairly implied in Petitioner's brief on the merits filed before the Nebraska Supreme Court.

Petitioner's Motion for Rehearing was overruled (T148).

ARGUMENT

I.

In revoking a person's driver's license the State must do so in a manner consistent with due process of law.

In *Bell v. Burson*, —— U. S. ——, 91 S. Ct. 1586, —— L. Ed. 2d ——, (1971) the United States Supreme Court speaking of driver's licenses said (91 S. Ct. 1589):

> "Once licenses are issued, as in the petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. Sniadach v. Family Finance Corp., 395

U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' Sherbert v. Verner, 374 U. S. 398, 83 S. Ct. 1970, 10 L. Ed. 2d 965 (1963) (disqualification for unemployment compensation); Slochower v. Board of Higher Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956) (discharge from public employment); Speiser v. Randall, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (denial of a tax exemption); Goldberg v. Kelly, *supra* (withdrawal of welfare benefits). See also Londoner v. Denver, 210 U. S. 373, 385-386, 28 S. Ct. 708, 713-714, 52 L. Ed. 1103 (1908); Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926); Opp Cotton Mills v. Administrator, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941)."

II.

Due process of law requires that the State be at least fundamentally fair in revoking a person's driver's license.

Due process of law has its foundation in the American ideal of fairness. *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1953). One of the ingredients of due process of law is "that fundamental fairness essential to the very concept of justice." *Lyons v. State of Oklahoma*, 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481 (1944).

Is it fair to tell someone that he has a right to remain silent and then when he remains silent say to the person "Your silence is a refusal, therefore, you lose your driver's license?"

CONCLUSION

It is respectfully submitted that the writ of certiorari should issue for the reasons set forth herein.

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APPENDIX A

OPINION OF THE NEBRASKA SUPREME COURT

JOHNSON v. DENNIS

37815 Filed June 4, 1971.

A failure to reply to a direct inquiry as to which test should be administered, as provided in the Implied Consent Act, under the circumstances in this case, was equivalent to a refusal to take any of the tests.

Heard before White, C. J., Spencer, Boslaugh, Smith, McCown, Newton, and Clinton, JJ.

BOSLAUGH. J.

The plaintiff, Robert Johnson, appeals from a judgment affirming the order of the Director of the Department of Motor Vehicles revoking the motor vehicle operator's license of plaintiff, under the Implied Consent Act. The question presented is whether the evidence is sufficient to sustain the finding by the trial court that the plaintiff refused to submit to the test provided in section 39-727.03, R. R. S. 1943.

The record shows that the plaintiff was arrested by a state patrolman for operating a motor vehicle while under the influence of alcoholic liquor. He was taken to the sheriff's office at Geneva, Nebraska, and advised that he had the right to an attorney and the right to remain silent. He was also advised concerning the Implied Consent Act and asked if he wanted to give the officer a blood or urine sample. The plaintiff replied that he would give a urine specimen and was handed a bottle by the officer. The plaintiff then said he would not give a urine sample, handed the bottle back to the officer, and asked to call his attorney. The attorney was called and came to the sheriff's

office. The officer again asked the plaintiff if he would give a urine sample or a blood sample. The plaintiff's attorney advised the plaintiff to remain silent and the plaintiff made no reply to the inquiry. No further attempt was made to obtain a specimen.

The plaintiff contends that silence is not a refusal and that the plaintiff had not withdrawn his implied consent to a blood test. As we view the record, the plaintiff withdrew his consent to a blood test when he elected to furnish a urine sample. When he changed his mind and refused to give the urine specimen, his refusal to submit to a test was complete.

The plaintiff argues that the officer should have arranged for a physician to come to the sheriff's office so that an attempt could have been made to withdraw a blood sample from the plaintiff's body. The plaintiff's theory is that the officer should have assumed that the plaintiff would allow a blood sample to be taken and that the plaintiff's silence in the face of a direct inquiry could not be considered a refusal.

Section 39-727.04, R. R. S. 1943, provides that the person arrested may choose the test to be performed. Silence in the face of a direct inquiry as to which test should be administered, under the circumstances in this case, was equivalent to an express refusal to submit to any test. See Buda v. Fulton, 261 Iowa 981, 157 N. W. 2d 336, holding total failure to cooperate equivalent to a refusal. See, also, Blattner v. Tofany, 312 N. Y. S. 2d 173, 34 App. Div. 2d 1066; State v. Pandoli, 109 N. J. Super. 1, 262 A. 2d 41; Campbell v. Superior Court (Arix.), 479 P. 2d 685; DiSalvo v. Williamson (R. I.), 259 A. 2d 671; Clancy v. Kelly, 180 N. Y. S. 2d 923, 7 App. Div. 2d 820.

Mills v. Swanson, 93 Idaho 279, 460 P. 2d 704, cited by the plaintiff, involved a driver who had been injured and was dazed. The statutory provision regarding a person who is unconscious or otherwise incapable of refusal, section 39-727.05, R. R. S. 1943, was not applicable here.

The evidence sustains the finding of the trial court that the plaintiff refused to submit to the test required by law. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

SUPREME COURT OF NEBRASKA, JANUARY TERM, A.D. 1971

July 20, 1971

ROBERT JOHNSON, Appellant,

vs.

EMMETT J. DENNIS, Director of Department of Motor Vehicles, State of Nebraska, Appellee

Appeal from the District Court of Fillmore County.

No. 37815.

This cause coming on to be heard upon motion of appellant for rehearing herein was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.